Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

DANIEL E. CARPENTER,

Petitioner,

vs.

DONALD M. ISRAEL and MARK R. TAYLOR,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do both the Full Faith and Credit Clause and Full Faith and Credit statute require a federal court to give full preclusive effect to a stipulated judgment of dismissal "with prejudice" entered in state court?

2. Should this Court exercise its supervisory power to reverse a Court of Appeals decision which erroneously overturned a District Court ruling that a stipulated judgment of dismissal "with prejudice" entered in state court had preclusive effect on the *exact* same claims involving the same parties in federal court?

3. Does the Supremacy Clause require a federal court to apply federal law when it conflicts with state law and when federal law gives *greater* preclusive effect to a stipulated judgment of dismissal "with prejudice" than the laws of the rendering state?

LIST OF PARTIES

Petitioner Daniel E. Carpenter ("Carpenter") was a Defendant in the United States District Court for the Southern District of New York (the "District Court"). Carpenter's wholly-owned corporate affiliates, Benefit Concepts New York, Inc. ("BCNY") and Voluntary Benefit Systems, Inc. ("VBS"), both organized under the laws of the State of Delaware, were also Defendants in the District Court but were granted summary judgment from which the Plaintiffs did not appeal. Carpenter was therefore the sole Appellee before the United States Court of Appeals for the Second Circuit ("Court of Appeals" or "Second Circuit") and is the sole Petitioner in this Court.

Donald M. Israel and Mark R. Taylor (collectively, "Israel") were Plaintiffs in the District Court, Appellants in the Court of Appeals, and are Respondents in this Court.

Neither BCNY nor VBS has parent or subsidiary corporations.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Israel v. Carpenter*, 120 F.3d 361 (2d Cir. 1997) (App. A). The opinion of the District Court in *Israel v. Carpenter* is not published, but can be found at 1996 WL 563343 (S.D.N.Y., Oct. 3, 1996) (App. B), which is a reversal of the District Court's prior opinion in *Israel v. Carpenter*, which is not published but can be found at 1996 WL 257643 (S.D.N.Y., May 15, 1996) (App. C).

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion and judgment issued by the Court of Appeals on August 11, 1997. The Court of Appeals denied a timely petition for rehearing with a suggestion for rehearing en banc on September 19, 1997. (App. D).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Full Faith and Credit Clause of the United States Constitution, U.S. Const., Art. IV, § 1, provides in relevant part:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.

The Supremacy Clause of the United States Constitution, U.S. Const., Art. VI, cl. 2, provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; . . . any Thing in

the Constitution or Laws of any State to the Contrary notwithstanding.

STATUTE INVOLVED

The Full Faith and Credit statute, 28 U.S.C. § 1738, provides in relevant part:

> The records and judicial proceedings of any court of any such State, . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State, . . . from which they are taken.

STATEMENT OF THE CASE

A. Preliminary Statement

The primary question in this case is whether a stipulated judgment of dismissal "with prejudice" entered in Massachusetts state court must be deemed *res judicata*, thereby precluding the *exact* same claims from later being relitigated in federal court by the same plaintiffs against the same defendant.[1]

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1. "Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under *collateral estoppel*, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case."

Allen v. McCurry, 449 U.S. 90, 94 (1980). Given this definition, this case clearly involves *res judicata* (otherwise also known as "claim preclusion").

Although the answer to this question may appear to be obvious, given this Court's clear pronouncements on the issue over the past 200 years, the Court of Appeals apparently did not agree. Instead, the Court of Appeals effectively held that a New York federal district court abused its discretion and committed an error of law by refusing to consider *post facto* assertions by the plaintiffs that a stipulated judgment of dismissal "with prejudice" entered in Massachusetts state court did not bar subsequent relitigation of the *exact* same claims in New York federal court.

B. Background

On August 10, 1993, a stipulation of dismissal "with prejudice" was entered as a judgment in Massachusetts state court in an action which Israel had filed against Carpenter. On March 29, 1995, Israel filed an action against Carpenter in New York state court (later removed by Carpenter to the District Court) alleging the *exact* same claims which had previously been dismissed against Carpenter "with prejudice" in Massachusetts state court.

On May 15, 1996, the District Court denied Carpenter's motion for summary judgment based on *res judicata*. Finding ambiguity in an otherwise facially unambiguous stipulation of dismissal "with prejudice," the District Court denied Carpenter's motion for summary judgment but granted summary judgment to Carpenter's corporate affiliates BCNY and VBS on issues unrelated to this appeal.

On June 14, 1996, Carpenter filed a notice of appeal from the denial of his summary judgment motion, but withdrew the appeal (without prejudice to any right to seek reinstatement) in order to move in the District Court under Fed. R. Civ. P. 60(b) for relief from the District Court's order denying him summary

judgment, on the ground that the District Court should have deemed the Massachusetts state court stipulated judgment of dismissal "with prejudice" *res judicata*, thereby barring subsequent relitigation of the same claims between the same parties in New York federal court.

On reconsideration, the District Court issued an opinion and order dated October 3, 1996, agreeing that *res judicata* applied and granting Carpenter's Rule 60(b) motion. The effect thereof was to grant Carpenter's motion for summary judgment thereby dismissing the complaint.

On November 6, 1996, Israel filed a timely notice of appeal from the District Court's Rule 60(b) opinion and order.[2] After oral argument, the Court of Appeals reversed the District Court in an opinion issued on August 11, 1997.

Carpenter then filed a timely petition for rehearing with a suggestion for rehearing en banc, but that petition was denied by the Court of Appeals, without opinion, in an order dated September 19, 1997. This timely Petition for *Writ of Certiorari* follows.

STATEMENT OF FACTS

In February 1993, Israel sued Carpenter and three unrelated corporate defendants in Massachusetts state court (the "Massachusetts Action") (App. B at 18a), even though Israel and Carpenter both worked on the same floor of the same office building in New York City. The Massachusetts Action alleged that Carpenter breached certain terms of the "buyout agreement" that Israel and Carpenter executed in September 1991 by which

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2. Israel appealed the grant of summary judgment *only* as to Carpenter, and not as to BCNY and VBS.

they disbanded and distributed the assets of their insurance and employee benefit consulting business. (App. A at 3a). As with most business divorces, the District Court was correct in characterizing this one as being "less than amicable." (App. A at 3a).

One month after Israel initiated the Massachusetts Action, Carpenter caused one of his wholly-owned corporate affiliates (BCNY) to bring suit against Israel (and two of Israel's corporate affiliates) in the District Court (the "Second Action") asserting, *inter alia*, federal trademark claims. (App. A at 3a-4a). Israel then filed a third-party complaint against Carpenter in the Second Action, alleging the same state law breach of contract claims that he had asserted in the Massachusetts Action. (App. A at 4a).

On August 10, 1993, the Massachusetts Action was concluded by the entering on the state court docket as a judgment a voluntary Stipulation of Dismissal, drafted by Israel's attorneys (App. C at 31a), that "dismissed *with prejudice*" (emphasis in original) Israel's claims against Carpenter and "dismissed *without prejudice*" (emphasis in original) Israel's claims against the other unrelated corporate defendants. (App. A at 4a).

Although the Massachusetts Action had been dismissed with prejudice against Carpenter, the Second Action continued to languish on the docket of the District Court for some 20 more months, as the case was transferred between and among several District Court judges before finally coming to rest before a magistrate judge. (App. A at 4a). However, during this 20-month hiatus, there was no activity in the case as between Israel and Carpenter. Since Israel never once prosecuted his claim during this 20-month period, Carpenter obviously deemed such inaction on Israel's part as Israel abiding by the stipulation of dismissal entered in Massachusetts. (App. A at 11a-12a).

In March 1995, the District Court (i) granted Israel's motion for summary judgment on the federal trademark claims; and (ii) declined to exercise supplemental jurisdiction, pursuant to 28 U.S.C. § 1367(c), over Israel's pendent state law claims in the third-party complaint. (App. A at 4a). Thus, Israel's third-party complaint against Carpenter was, along with Carpenter's other state law claims, dismissed without prejudice for want of subject matter jurisdiction, although Israel had earlier dismissed his state law claims against Carpenter "with prejudice" in the Massachusetts Action.[3]

The ink had not yet dried on the District Court's decision in the Second Action when, on the very next day (March 20, 1995), Israel sued Carpenter for a *third* time, this time in New York state court, alleging yet again the *exact* same state law breach of contract claims that Israel had asserted against Carpenter twice before (once in the Massachusetts Action and again in the third-party complaint in the Second Action).[4] (App. A at 4a). Carpenter then removed this new action (the "Third Action") to the District Court under 28 U.S.C. § 1441(a), invoking diversity jurisdiction under 28 U.S.C. § 1332(a)(1). The Third Action is an *exact* word-for-word duplicate of the two previous actions regarding Israel's state law claims against Carpenter that were dismissed "with prejudice" in Massachusetts. (App. C at 24a).

Immediately after removing the Third Action, Carpenter filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6)

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3. Since the District Court declined to exercise subject matter jurisdiction over the third-party complaint in the Second Action, the District Court did not reach Carpenter's motion for summary judgment on the issue of *res judicata*.

4. Israel also sued BCNY and VBS as new defendants in the New York state court proceeding.

based on *res judicata*, arguing that the stipulation of dismissal "with prejudice" in Carpenter's favor entered in the Massachusetts Action barred the same claims from being relitigated. (App. C at 24a). Israel cross-moved to remand the case to New York state court, asserting lack of diversity. (App. C at 24a).

The District Court denied Israel's motion to remand but also denied Carpenter's motion to dismiss without prejudice to allow refiling as a motion for summary judgment after instructing the parties to conduct limited discovery into the "intent" of the parties in executing the stipulation of dismissal in Massachusetts.[5] (App. C at 24a).

After discovery was completed, Carpenter filed his motion for summary judgment on March 14, 1996. On May 15, 1996, the District Court issued an opinion and order granting the motion in part and dismissing the complaint as to BCNY and VBS,[6] but denied the motion as to Carpenter on *res judicata* grounds.

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5. During discovery, Israel's Massachusetts attorney (who drafted the stipulation of dismissal and filed it with the Massachusetts court) (App. C at 31a) alleged that the intent of both parties was to dismiss the claims against Carpenter "with prejudice" *only* with respect to the refiling of those claims in Massachusetts. However, Israel's attorney did not file a motion to modify the stipulated judgment (which he drafted) under Mass. R. Civ. P. 60(b), 365 Mass. 730, 828 (1974); which in all respects material hereto is identical to Fed. R. Civ. P. 60(b). Instead, Israel has collaterally attacked the Massachusetts stipulated judgment of dismissal with prejudice by claiming in federal court in New York that there was a "misunderstanding" regarding the judgment's intended geographical scope.

6. The District Court noted that (i) BCNY was sued for breach of an agreement to which it was not a party and which had earlier been

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Carpenter then filed a notice of appeal from the denial of summary judgment,[7] but withdrew the appeal (without prejudice to any right to seek reinstatement) in order to move in the District Court for relief from the denial of his motion for summary judgment pursuant to Fed. R. Civ. P. 60(b). In support of his Rule 60(b) motion, Carpenter relied on Second Circuit precedent which had not previously been brought to the District Court's attention as well as a recently decided Massachusetts federal district court case which called into question an earlier case on which the District Court had relied in denying Carpenter's motion for summary judgment. (App. B at 19a).

Specifically, in his Rule 60(b) motion, Carpenter relied on *Nemaizer v. Baker*, 793 F.2d 58 (2d Cir. 1986), which held that even if the parties have a "misunderstanding" regarding the scope of a stipulation of dismissal with prejudice, the intent of the parties is irrelevant as a matter of law and a court cannot look behind the stipulation's plain language. "To rule otherwise would empty the finality of judgments rule of meaning." *Id.* at 63. *See also NBN Broadcasting, Inc. v. Sheridan Broadcasting Networks, Inc.*, 105 F.3d 72, 78 (2d Cir. 1997) (stipulation of dismissal with prejudice is "deemed a final adjudication on the merits for

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(Cont'd)
voided (App. C at 33a-34a); and (ii) although VBS was named in the caption of the complaint, no causes of action were alleged against it in the body of the complaint. (App. C at 34a-35a). Naming BCNY and VBS as parties was a clearly transparent attempt by Israel to evade the preclusive effect of the Massachusetts judgment by frivolously adding more parties to the action in order to accomplish an "end run" around *res judicata*.

7. Although the denial of summary judgment is not generally an appealable order, *see Swint v. Chambers County Commission*, 514 U.S. 35, 41 (1995), it may be appealable, in certain circumstances, under the "collateral order" doctrine enunciated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and its progeny.

res judicata purposes on the claims asserted or which could have been asserted in the suit."); *Samuels v. Northern Telecom, Inc.*, 942 F.2d 834, 836 (2d Cir. 1991) ("A stipulation dismissing an action with prejudice . . . has the effect of a final adjudication on the merits favorable to defendant and bars future suits brought by plaintiff upon the same cause of action.").

Thus, with these authorities in hand, the District Court found that both the Court of Appeals in *Nemaizer* and the Massachusetts federal district court in the other case "exhibited a decided reluctance to find ambiguity in the language of a stipulation of dismissal." (App. B at 20a-21a). As a result, the District Court reversed its earlier decision, granted Carpenter's Rule 60(b) motion, and entered summary judgment for Carpenter on the basis of *res judicata,* thereby dismissing the complaint.

On appeal, the Court of Appeals reversed and vacated the District Court's Rule 60(b) opinion and order, holding that the District Court should have looked behind the otherwise unambiguous stipulation to allow Israel to submit *post facto* evidence effectively modifying the dismissal "with prejudice."

REASONS FOR GRANTING THE WRIT

I.

A TRUE, DIRECT AND IRRECONCILABLE CONFLICT EXISTS BETWEEN THE DECISION BELOW AND DECISIONS RENDERED BY THIS COURT AND THOSE OF OTHER CIRCUITS.

The notion that courts should consider *post facto* allegations of oral limiting conditions to a stipulation of dismissal with prejudice in order to modify the effect of the stipulation, conflicts not only with previous decisions of this Court, but with those of

other circuits as well. Additionally, the concept is anathema to the overarching principle of finality of judgments embodied in dismissals with prejudice. Furthermore, in this case, the stipulation was drafted by Israel's attorneys and was executed in their offices.

"Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen*, 449 U.S. at 94. This bedrock principle assures the finality of judgments by precluding a party to a lawsuit (such as Israel) from litigating a claim more than once. Furthermore,

> [a]s this Court and other courts have often recognized, *res judicata* and *collateral estoppel* relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.

Id.

Other circuits have made it clear that the legal meaning of a stipulation of dismissal with prejudice is very well established:

> [I]t is clear that a stipulation of dismissal with prejudice . . . at any stage of judicial proceeding, normally constitutes a final judgment on the merits which bars a later suit on the same cause of action.

Citibank v. Data Lease Financial Corp., 904 F.2d 1498, 1501-1502 (11th Cir. 1990) (internal citations and quotations omitted). *Citibank* is particularly illustrative here, because in that case the Eleventh Circuit refused to allow a later suit even though it was clear that there was an intention to limit the scope of the prior dismissal. *See id.* at 1505 ("An attorney's failure to evaluate

carefully the legal consequences of a chosen course of action provides no basis for relief from a judgment.").[8]

Similarly, in *TCBY Systems, Inc. v. EGB Associates, Inc.*, 2 F.3d 288, 291 (8th Cir. 1993), the Eighth Circuit held that a "misunderstanding as to the legal effect of a dismissal with prejudice does not warrant a hearing." *Id.* (also citing *Nemaizer*).

In the same vein, in *Harrison v. Edison Brothers*, 924 F.2d 530 (4th Cir. 1990), where the stipulating parties intended to dismiss certain parties but not another, the Fourth Circuit held:

> Harrison made an inadvertent but grave mistake by dismissing Wall with prejudice. A court has no appealing choice when a party seeks to unscramble the egg it has made for itself.

Id. at 535.

The same reasoning holds true in the present case. By filing suit in New York and claiming that the stipulation was intended to preclude only further litigation in Massachusetts, Israel seeks to unscramble the egg that he has made for himself.

Moreover, on facts identical to those in the present case, the Seventh Circuit, applying full faith and credit principles, held that a stipulation of dismissal with prejudice entered in a state court proceeding bars a subsequent federal action on the same claims involving the same parties.

In *Threshermen's Mut. Ins. Co. v. Wallingford Mut. Ins. Co.*,

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8. The Eleventh Circuit cited the Second Circuit's holding in *Nemaizer* that because the plaintiff "entered into the stipulation dismissing its claims . . . 'with prejudice' . . . [plaintiff] cannot avoid the consequences of such a prior act." *Citibank*, 904 F.2d at 1505.

26 F.3d 776 (7th Cir. 1994), a party executed a stipulation of dismissal with prejudice in a state court proceeding. Thereafter, the same party initiated an action in federal court against one of the parties who had been dismissed with prejudice in the earlier state court proceeding.

The Seventh Circuit first determined that, pursuant to the Full Faith and Credit statute (28 U.S.C. § 1738), the preclusive effect of the state court judgment was governed by the law of the rendering State (Wisconsin). Since Wisconsin law holds that a stipulation of dismissal with prejudice constitutes a final judgment for *res judicata* purposes, the Seventh Circuit gave "full faith and credit to the state court's *res judicata* principles," *Threshermen's*, 26 F.3d at 781, and affirmed the district court's ruling that the subsequent federal suit was barred by *res judicata*.

In a final attempt to avoid the *res judicata* effect of the stipulation entered in state court, the plaintiff in *Threshermen's* argued that

> [F]undamental fairness should prevent application of *res judicata* because that doctrine should never be applied in such a fashion as to deprive a party of the opportunity to have a full and fair determination of an issue.

Id. at 783. However, the Seventh Circuit correctly dismissed this argument, holding that

> [n]ow fairness lies with the other parties: Fairness to the defendant and sound judicial administration require that at some point litigation over the particular controversy must come to an end.

Id. (internal citations and quotations omitted).

Unfortunately, in the instant case, the Second Circuit has failed to heed these bedrock principles as enunciated not only by this Court, but by the Eleventh, Eighth, Fourth and Seventh Circuits, among others.

The Supreme Judicial Court of Massachusetts has held that "a dismissal with prejudice constitutes an adjudication on the merits as fully and completely as if the order had been entered after trial." *Department of Revenue v. LaFratta*, 408 Mass. 688, 693, 562 N.E.2d 1352, 1355 (1990) (internal citations and quotations omitted). Also, under Massachusetts law, a stipulation of dismissal with prejudice "constitutes a judgment." *Saint Louis v. Baystate Medical Center, Inc.*, 30 Mass. App. Ct. 393, 402, 568 N.E.2d 1181, 1187 (1991). Thus, for *res judicata* purposes, just as the stipulation in *Threshermen's*, the stipulation of dismissal with prejudice in the Massachusetts Action constitutes a final judgment on the merits in favor of Carpenter.

Similarly, also just like the plaintiff in *Threshermen's*, Israel has now brought a subsequent federal court action alleging the same claims against Carpenter which Israel had previously dismissed with prejudice in the prior state court proceeding. However, unlike the Seventh Circuit in *Threshermen's*, the Second Circuit in this case did not give full faith and credit to the stipulation of dismissal with prejudice entered in the Massachusetts Action. Instead, using a tortured analysis, the Second Circuit ruled that Israel should be allowed to offer evidence of alleged *post facto* limitations on the stipulation of dismissal that was drafted by his own attorneys and executed in their offices.

At bottom, the Second Circuit's decision below appears to hinge on nothing more than a "fundamental fairness" argument that Israel should be allowed to litigate his claims against Carpenter, *i.e.*, that Israel should be allowed to have his "day in court." But Israel has had his day in court, not once, but three

times. And it is difficult to believe that the stipulation of dismissal does not accurately reflect Israel's true intent, since it was Israel's attorneys who drafted the stipulation.

Israel has asserted the *exact* same claims against Carpenter in three separate lawsuits, in two jurisdictions, in three different courts before six different judges. Yet Carpenter was supposed to have had these claims against him dismissed *with prejudice* almost five years ago. On these undisputed facts,

> [n]ow fairness lies with [Carpenter]: Fairness to [Carpenter] and sound judicial administration require that at some point litigation over the particular controversy must come to an end.

Threshermen's, 26 F.3d at 783 (internal citations and quotations omitted).

This particular case and controversy must now come to an end. Since the decision below issued by the Second Circuit clearly is in direct conflict with previous decisions of this Court as well as those of other Circuits, the Writ should be granted, the Second Circuit's decision reversed and vacated, and the District Court's ruling in favor of Carpenter reinstated.

II.

BECAUSE THE DECISION BY THE SECOND CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER.

Israel was the plaintiff in the Massachusetts Action, Israel's attorneys drafted the stipulation, and the stipulation dismissed the claims against Carpenter *with prejudice*. Two years later,

Israel sued Carpenter again, this time in New York, alleging the *exact* same claims which were previously dismissed *with prejudice* in Massachusetts. Israel "cannot now seek to relitigate the issue through the back door, namely [a federal court action in New York]." *Dept. of Revenue*, 408 Mass. at 693, 562 N.E. 2d at 1355.

Israel argues that "it was understood and intended by everyone involved that the stipulation would terminate *only* litigation of the Massachusetts Action, . . ." (App. A at 10a). However, *arguendo*, under the Full Faith and Credit statute, a dismissal with prejudice entered in Massachusetts state court must be deemed to be a dismissal with prejudice in "every court within the United States," 28 U.S.C. § 1738, thereby barring relitigation of the same claims in all other forums. Thus, Israel's sole argument is turned on its head and destroyed when basic full faith and credit principles are applied, basic principles which the Second Circuit did not apply.

In the dawn of our Nation's history, Chief Justice Marshall declared for a unanimous Court that a

> judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced.

Hampton v. M'Connel, 16 U.S. (3 Wheat.) 234, 235 (1818). Over the ensuing two centuries, this concept has remained a fixed luminary in our constitutional constellation.

Yet, Chief Justice Marshall must be turning over in his grave after discovering that a federal court in New York failed to give a stipulated judgment of dismissal with prejudice entered in Massachusetts state court the same validity and effect it had in Massachusetts.

And this is where the structural underpinnings of both Israel's argument and the Second Circuit's opinion fall away. If Carpenter was dismissed with prejudice in Massachusetts, meaning that Israel could not sue Carpenter again on the same claims *in Massachusetts*, then, by definition, Israel could not sue Carpenter on the same claims again *anywhere*, because every other court in the United States is required to give the same preclusive effect to the stipulation that the stipulation has in Massachusetts. Thus, if the stipulation precludes litigation in Massachusetts, it must preclude litigation elsewhere.

Because the Second Circuit's opinion below has so far departed from the accepted and usual course of judicial proceedings with respect to full faith and credit jurisprudence, this Court should exercise its supervisory power to grant the Writ, reverse and vacate the Second Circuit's ruling, and reinstate the District Court's ruling in favor of Carpenter.

III.

THE DECISION OF THE SECOND CIRCUIT RAISES IMPORTANT CONSTITUTIONAL ISSUES THAT HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Writ should be granted because the Second Circuit's opinion below also raises novel constitutional issues regarding the interaction between the Supremacy Clause and the Full Faith and Credit Clause, as well as overarching policy issues of federalism in general and the proper bounds of federal-state comity in particular.

The Second Circuit, in its attempt to apply Massachusetts law, held that the stipulation "requires consideration in light of all of the surrounding circumstances — consideration that the district court failed to give." (App. A at 9a). To the extent that

Massachusetts law does in fact allow a court to look behind a facially unambiguous stipulation of dismissal with prejudice in order to find ambiguity based on *post facto* allegations of one of the parties, such law clearly conflicts with federal law. If so, Petitioner respectfully contends that the Supremacy Clause requires federal courts to apply *federal* law in cases where federal rules of *res judicata* are more preclusive than the laws of the State from which the judgment is taken.

Pursuant to the Supremacy Clause, it is axiomatic that state law that conflicts with federal law is "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). *See also Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (preemption occurs "when state law is in actual conflict with federal law"); *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995) ("Our past cases have recognized that the Supremacy Clause, U.S. Const., Art. VI, may entail preemption of state law either by express provision, *by implication, or by a conflict between federal and state law*.") (Emphasis added).

Thus,

> [i]f the federal courts have developed rules of *res judicata* and *collateral estoppel* that prevent relitigation in circumstances that would not be preclusive in state courts, *the federal courts should be free to apply them* . . .

Migra v. Warren City School Dist. Bd. of Ed., 465 U.S. 75, 88 (1984) (White, J., concurring) (emphasis added). *See also Matsushita Elec. Indus. Co. v. Epstein*, __ U.S. __, 116 S. Ct. 873, 888, 134 L. Ed.2d 6 (1996) (Ginsburg, J., concurring in part and dissenting in part) ("Every State's law on the preclusiveness of judgments is pervasively affected by the supreme law of the land.").

Petitioner respectfully contends that this Court should adopt Justice White's *Migra* concurrence as the law of the land and hold that, if federal principles of *res judicata* prevent relitigation of previously litigated state law claims in circumstances that would *not* be preclusive under the laws of the particular State, the Supremacy Clause requires that federal courts apply federal law and bar the litigation.

Some commentators and courts have stated that

> [A] federal court sometimes may apply a federal rule of *res judicata* and give a *greater* preclusive effect to a state court judgment than accorded by the state's law.

F.D.I.C. v. Eckhardt, 691 F.2d 245, 247 (6th Cir. 1982). *See also* Vestal, *Res Judicata Preclusion By Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723, 1726, 1728 (1968); Burbank, *Interjurisdictional Preclusion and Federal Common Law: Toward A General Approach*, 70 CORNELL L. REV. 625, 639-640 (1985).

Another commentator has suggested that courts should give greater preclusive effect to another state court's judgment "when an important interest is involved" in the successor forum. Getschow, *If at First You Do Succeed: Recognition of State Preclusive Laws in Subsequent Multistate Actions*, 35 VILL. L. REV. 253, 276 (1990).

> Further, this extension neither offends nor contradicts the policies supporting full faith and credit. The policy of uniformity, which is the heart of full faith and credit, is not abrogated by providing a *greater* effect to issue preclusion, whether asserted offensively or defensively, because, at a minimum,

> the rendering jurisdiction's judgment will be given the same effect.

Id. at 277 (emphasis added).

Yet another commentator has gone even further and directly suggested that the rule Petitioner respectfully requests this Court to adopt in this case is well within the bounds of historical full faith and credit jurisprudence:

> It is much less clear whether a federal court may hold a claim or issue precluded when it would not be under the law of the rendering state. Although the statutory language ("the same full faith and credit") suggests it may not, the central purpose of the statute seems to be to assure that state judgments are respected elsewhere. To give a judgment *greater* preclusive effect than it possesses under the law of the rendering state would not offend this policy, and the legitimate interest of the federal forum in reducing its own docket would be served.

Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 326-327 (1978) (emphasis added).

In fact, Judge Posner put his finger on this constitutional button in the lower court opinion in *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150 (7th Cir. 1984):

> Intended as it was to protect the authority of state courts, section 1738 ought not to prevent a federal

> court from giving a state judgment *more* effect in a federal suit than the courts of the state would give it in a state suit. *A federal court does not undermine the authority of a state's courts when it holds that a state judgment bars a federal suit.*

Id. at 1154 (emphasis added).

Although this Court reversed the lower court ruling in *Marrese*, *see Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985), this Court did not opine on the "unsettled question" posed by Judge Posner above, *i.e.*, whether a federal court can give greater preclusive effect to a state court judgment than the courts in the rendering state would give it. In fact, in his *Marrese* concurrence, Chief Justice Burger intimated that overarching federal policy concerns weigh in favor of using a stronger federal rule of *res judicata* if the result is to place finality on litigation:

> At the same time, the federal courts have direct interests in ensuring that their resources are used efficiently and not as a means of harassing defendants with repetitive lawsuits, . . . When state law is indeterminate and ambiguous, a clear federal rule would promote substantive interests as well: Uncertainty intrinsically works to defeat the opportunities for repose and reliance sought by the rules of preclusion, and confounds the desire for efficiency by inviting repetitious litigation to test the preclusive effects of the first effort.

Marrese, 470 U.S. at 390 (1985) (Burger, C.J., concurring) (internal citations and quotations omitted).

There is nothing in the Full Faith and Credit Clause, the

Full Faith and Credit statute, nor the policies underlying them, that prevents a federal court from holding that a state court judgment of dismissal with prejudice bars a federal suit. Petitioner respectfully requests that this Court grant the Writ, codify this statement into law, and reverse and vacate the Second Circuit's ruling.

CONCLUSION

For all of the foregoing reasons, this Court should grant the Petition of Carpenter in this matter, review, reverse and vacate the erroneous decision of the United States Court of Appeals for the Second Circuit, and reinstate the District Court's ruling in Carpenter's favor.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED AUGUST 11, 1997

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1634 — August Term 1996

(Argued: June 4, 1997 Decided: August 11, 1997)

Docket No. 96-9480

DONALD M. ISRAEL; MARK R. TAYLOR,

Plaintiffs-Appellants,

-v.-

DANIEL E. CARPENTER; BENEFIT CONCEPTS NEW YORK, INC.; VOLUNTARY BENEFIT SYSTEMS, INC.,

Defendants-Appellees.

Before:

MESKILL, JACOBS, AND LEVAL,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York (Francis, *M.J.*), granting summary judgment to defendants and dismissing plaintiffs' breach of contract claims on the ground of res judicata. The district court held that plaintiffs' claims were barred by the parties' prior stipulation dismissing a related state-court proceeding "with prejudice."

Appendix A

Vacated and remanded.

JAY D. FISCHER, Fischer Weisinger Caliguire Porter & Pierce, New York, NY (Philip Pierce, of counsel), *for Plaintiffs-Appellants.*

JACK E. ROBINSON, Carpenter & Robinson, LLP, Stamford, CT, *for Defendants-Appellees.*

JACOBS, *Circuit Judge:*

This appeal raises a question under Massachusetts law as to the scope and effect, for res judicata purposes, of a stipulation to dismiss "with prejudice" one of two lawsuits pending between the same parties based on essentially identical claims. Appellants Donald M. Israel and Mark R. Taylor (collectively "Israel") have asserted the same breach of contract claims against appellee Daniel E. Carpenter in three separate lawsuits, in two jurisdictions.[1] The stipulation at issue dismissed the first of these actions, a Massachusetts state-court suit; but the parties took no contemporaneous step to terminate the second suit between them (contesting the same issues), which was pending simultaneously in the United States District Court for the Southern District of New York. The suit underlying this appeal is a subsequently asserted *third* action (removed to the Southern District) between the same interests, on the same claims. The district court (Francis, *Magistrate Judge*) initially ruled that the present suit was not barred by res judicata notwithstanding the dismissal "with prejudice" of the Massachusetts action, and denied Carpenter's motion for summary judgment; but the court

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1. All three actions also involved claims by and against Israel's and Carpenter's various affiliated corporate entities.

later granted Carpenter's motion pursuant to Fed. R. Civ. P. 60(b) to vacate that ruling, and dismissed Israel's breach of contract claims. On appeal, Israel argues that the court's October 3, 1996 Memorandum and Order, granting the Rule 60(b) motion and dismissing his claims, was an abuse of discretion.

We conclude that the district court erred by considering the parties' stipulation of dismissal under general federal-law principles, and gave insufficient consideration to the principles of contract construction — under Massachusetts law — that properly govern interpretation of the stipulation agreement. Accordingly, we vacate the judgment dismissing Israel's claims, and remand for further proceedings.

BACKGROUND

Israel, Taylor, and Carpenter were once partners in an insurance brokerage and employee benefit consulting business. This controversy arises from what the district court characterizes as their "less than amicable" "business divorce." *See Israel v. Carpenter*, No. 93-CV-1961, 1995 WL 133773, Memorandum and Order, at *1 (S.D.N.Y. Mar. 28, 1995). The underlying dispute concerns the distribution of their business assets, including the allocation of trademark rights; in particular, Israel alleges that Carpenter breached the terms of the parties' Buyout Agreement, which contained various stock-purchase and licensing provisions. *Id.*

The Prior Actions. In February 1993, Israel sued Carpenter and three corporate defendants for breach of contract in Massachusetts state court (the "Massachusetts Action"). The next month, Carpenter caused a corporation wholly owned by him, Benefit Concepts New York, Inc. ("BCNY"), to bring suit against

Israel (and two other corporate defendants) in the Southern District of New York (the "First Southern District Action"), asserting, *inter alia*, federal trademark claims under sections 32(1) and 43(a) of the Lanham Act, 15 U.S.C. §§ 1114(1), 1125(a). Israel then filed a third-party complaint against Carpenter in the First Southern District Action, alleging essentially the same state-law breach of contract claims that he had asserted in Massachusetts.

The Massachusetts Action was concluded by a voluntary Stipulation of Dismissal, dated August 10, 1993, that "dismissed *with prejudice*" Israel's claims against Carpenter and "dismissed *without prejudice*" his claims against the three corporate defendants. The First Southern District Action continued to pend for some 20 more months; that action was concluded when the district court (i) granted Israel's motion for summary judgment dismissing BCNY's federal trademark claims *with prejudice*, and (ii) declined to exercise supplemental jurisdiction, pursuant to 28 U.S.C. § 1367(c), over Israel's pendent state-law claims, thereby dismissing those claims *without prejudice*. *See Israel*, 1995 WL 133773, at *6.

The Present Action. The lawsuit underlying this appeal (the "Present Action") was filed on March 29, 1995, the day after the First Southern District Action was dismissed. In this third action, Israel sued Carpenter, BCNY, and another corporate defendant (collectively, "Carpenter") in New York State Supreme Court, New York County, once more alleging essentially the same breach of contract claims that he had asserted against Carpenter twice before. Carpenter removed this case to federal district court, invoking diversity jurisdiction; he thereafter moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), arguing that Israel's claims were barred by res judicata and collateral estoppel by

virtue of the with-prejudice dismissal of those claims in the Massachusetts Action. *See Israel v. Carpenter*, 95-CV-2703, 1996 WL 257643, Memorandum and Order, at *1 (S.D.N.Y. May 15, 1996). Israel cross-moved to remand the case to state court, asserting lack of diversity jurisdiction. *See Israel v. Carpenter*, 95-CV-2703, 1995 WL 640534, Memorandum and Order, at *1 (S.D.N.Y. Oct. 31, 1995). Both parties sought sanctions.

After further motion practice and several interim rulings, the district court denied Israel's motion to remand (finding that complete diversity existed), *Israel v. Carpenter*, 95-CV-2703, 1996 WL 11252, Memorandum and Order, at *2 (S.D.N.Y. Jan. 11, 1996), and denied Carpenter's motion seeking summary judgment on the ground of res judicata, *Israel v. Carpenter*, 95-CV-2703, 1996 WL 257643, Memorandum and Order, at *6 (S.D.N.Y. May 15, 1996) ("Summary Judgment Order").

In deciding the summary judgment issue, the district court considered the preclusive effect of the Massachusetts stipulation of dismissal under principles of Massachusetts law,[2] citing *Duncan Galvanizing Corp. v. Valspar Corp.*, No. 93-12368-Z, 1995 WL 96954, at *1 (D. Mass. Feb. 21, 1995) ("*Duncan I*"), for the proposition that "Massachusetts applies the principles of contract law to the interpretation of a stipulated dismissal." Summary Judgment Order at *4. The court concluded that under Massachusetts contract law, the stipulation was unclear as to whether the parties intended to terminate Israel's action against Carpenter with prejudice only as to the reassertion of such claims

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2. The court was of course required to apply state law in this analysis. *See, e.g., Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984) (federal courts must give state-court judgments the same preclusive effect as would be given the judgments under the law of the state in which they were rendered).

in Massachusetts, or whether they intended to preclude further litigation of those claims anywhere. *Id.* at *5. The district court denied summary judgment on the ground that the ambiguous stipulation and the factual submissions of the parties allowed competing inferences to be drawn about the parties' intent in dismissing the Massachusetts Action "with prejudice." *Id.* at *6.

Carpenter filed a notice of appeal from the denial of summary judgment, but withdrew the appeal (without prejudice to any right to seek reinstatement) in order to move in the district court for relief from the Summary Judgment Order under Fed. R. Civ. P. 60(b). *See Israel v. Carpenter*, No. 95-CV-2703, 1996 WL 563343, Memorandum and Order, at *1 (S.D.N.Y. Oct. 3, 1996) (the "Rule 60(b) Order"). In support of his Rule 60(b) motion, Carpenter relied on *Nemaizer v. Baker*, 793 F.2d 58 (2d Cir. 1986), which was not previously brought to the district court's attention, and on a subsequent decision in the *Duncan Galvanizing* case that the court had cited as authority for applying Massachusetts contract law to the interpretation of the parties' stipulation; Carpenter contended that the new opinion, *Duncan Galvanizing Corp. v. Valspar Corp.*, No. 93-CV-12368-GAO, 1996 WL 464048 (D. Mass. July 12, 1996) ("*Duncan II*"), "overturned" the opinion on which the district court had relied. Rule 60(b) Order at *1.

With these authorities in hand, the district court determined that its prior order denying summary judgment was erroneous. The court rejected Carpenter's assertion that *Duncan II* undermined the rule in *Duncan I* that Massachusetts employs contract principles to construe a stipulation of dismissal; but the court nonetheless found it "instructive" that *Duncan II* applied res judicata where the stipulation directed a "with prejudice" dismissal, "without making any provision for [the]

alleged collateral oral agreement" that was at issue in that case. Rule 60(b) Order at *2 (quoting *Duncan II*, 1996 WL 464048, at *4). Turning to this Court's opinion in *Nemaizer*, the district court found a similar clear-statement rule in our holding that a plaintiff who "intended to preserve [the] right" to assert an ERISA claim based on the same facts that had supported his voluntarily dismissed state-court claim, "should not have entered into this type of 'with prejudice' stipulation." *Id.* (quoting *Nemaizer*, 793 F.2d at 62).

Discerning in *Duncan II* and *Nemaizer* "a decided reluctance to find ambiguity in the language of a stipulation of dismissal," the district court felt

> constrained to hold that [Israel is] barred from raising in this action the claims that were dismissed by stipulation in Massachusetts. There, [he] agreed to a dismissal "with prejudice" as to Mr. Carpenter. Yet [Israel's] counsel failed to specify that the claims nevertheless could be revived in a different forum, as was purportedly [Israel's] intent. As in both *Duncan II* and *Nemaizer*, [Israel] must bear the consequences of this omission.

Id. The district court therefore granted relief under Rule 60(b) and entered summary judgment dismissing Israel's complaint. *Id.* at *3.

DISCUSSION

We review the district court's decision to grant relief under Rule 60(b) for abuse of discretion. *See DeWeerth v. Baldinger*, 38 F.3d 1266, 1272 (2d Cir. 1994). An error of law may constitute

such an abuse. *See Molloy v. Metropolitan Transp. Auth.*, 94 F.3d 808, 811 (2d Cir. 1996). We conclude that the district court erred here in granting Carpenter Rule 60(b) relief from its earlier order denying summary judgment.

Ordinarily, a stipulation of dismissal "with prejudice" as to a pending action is unambiguous; like any such dismissal, it is "deemed a final adjudication on the merits for *res judicata* purposes on the claims asserted or which could have been asserted in the suit." *NBN Broadcasting, Inc. v. Sheridan Broadcasting Networks, Inc.*, 105 F.3d 72, 78 (2d Cir. 1997). *See also Samuels v. Northern Telecom, Inc.*, 942 F.2d 834, 836 (2d Cir. 1991) ("A stipulation dismissing an action with prejudice . . . has the effect of a final adjudication on the merits favorable to defendant and bars future suits brought by plaintiff upon the same cause of action.") (internal quotations and citations omitted). Such a stipulation will (almost invariably) have preclusive effect notwithstanding a litigant's post hoc assertion that he intended to preserve certain claims. For example, in holding that a stipulation of dismissal "with prejudice" had res judicata effect in *Nemaizer v. Baker*, 793 F.2d 58, 62-63 (2d Cir. 1986), we stated:

> Mere dissatisfaction in hindsight with choices deliberately made by counsel is not grounds . . . to justify [relief under] Rule 60(b)(1) . . . . [A]n attorney's failure to evaluate carefully the legal consequences of a chosen course of action provides no basis for relief from judgment. . . . To rule otherwise would empty the finality of judgments rule of meaning.

(Internal citations omitted.) Our cases reflect a consistent reluctance to limit the effect of such a stipulation by looking

behind its plain language. *See, e.g.*, *Samuels*, 942 F.2d at 837 ("Res judicata may not be avoided on the basis of . . . an attorney's ill-considered decision to enter into an all-encompassing stipulation of withdrawal with prejudice.").

Nevertheless, we conclude that the broad principle in *Nemaizer* does not control this case; under a line of cases applying Massachusetts law, the stipulation here requires consideration in light of all of the surrounding circumstances — consideration that the district court failed to give.

A. *Nemaizer*

The facts of *Nemaizer* resemble the facts here, but the issues on appeal were different. The plaintiff in *Nemaizer* filed a suit in state court to collect contributions to an employee benefit trust fund; after the case was removed to federal court, the plaintiff stipulated to a dismissal of his complaint with prejudice because the underlying state-law cause of action became untenable. *See Nemaizer*, 793 F.2d at 60. Six months later, the plaintiff filed a similar complaint in the district court, this time pleading a federal claim under ERISA. *Id.* The defendant moved to dismiss the second complaint on the ground of res judicata, but the district court found that there had been a misunderstanding as to whether the stipulated dismissal was intended to permit the plaintiff to refile his claims under federal law, denied the motion to dismiss, and granted the plaintiff relief under Rule 60(b) to modify the stipulation. *Id.*

On appeal, the plaintiff argued that his counsel failed to appreciate the breadth of the stipulation, had never intended to foreclose a later federal claim under ERISA, and that what had occurred was "an honest mistake[,] . . . a misunderstanding of

what each party intended." *Id.* at 62. In reversing, we ruled that the stipulation of dismissal "clearly precluded [the plaintiff] from bringing the instant ERISA claim. Had [the plaintiff] intended to preserve that right, he should not have entered into this type of 'with prejudice' stipulation." *Id.* In particular, the *Nemaizer* court rejected the notion that the res judicata effect of the dismissal could be avoided on the ground that plaintiffs' counsel had made a *mistake* concerning the scope of the stipulation:

> Relief from counsel's error is normally sought pursuant to [Fed. R. Civ. P.] 60(b)(1) on the theory that such error constitutes mistake, inadvertence or excusable neglect. But we have consistently declined to relieve a client under subsection (1) of the burdens of a final judgment entered against him due to the mistake or omission of his attorney by reason of the latter's ignorance of the law or other rules of the court, or his inability to efficiently manage his caseload.

Id. (internal quotations and citations omitted). Although it seemed likely that "the consequences of entering into [the stipulated dismissal] were not fully weighed" by counsel, we concluded that, "even if responsibility rests with plaintiff's prior counsel, Rule 60(b)(1) does not provide an avenue for relief." *Id.*

The present case is distinguishable in (at least) this crucial respect: Israel makes no claim that the stipulation of dismissal as written was a product of counsel's "mistake" or any unilateral failure to appreciate its reach and effect. Rather, Israel argues that in the circumstances of this case, it was understood and intended by everyone involved that the stipulation would terminate *only* litigation of the Massachusetts Action, and that

the parties' parallel lawsuit, the First Southern District Action, would thereafter continue as the single arena for contesting all of their claims. Israel argues that

> execution of the Massachusetts stipulation of dismissal was but one aspect of the overall agreement to have the parties litigate all issues in [the Southern District of] New York. . . . [T]he only rational conclusion as to why the stipulation of dismissal was entered at all was to allow the [breach of contract] issue to be litigated in one rather than two forums in which the claim existed at the time the stipulation was signed.

Appellant's Brief at 14, 19. Thus Israel is seeking to limit the stipulation of dismissal to its allegedly mutually intended scope, not to escape it by pleading a unilateral mistake.

Israel points to three facts (essentially uncontested) to demonstrate that the stipulated dismissal of the Massachusetts Action, as intended, had a limited scope and effect: (a) two lawsuits involving the same parties and identical breach of contract claims were pending simultaneously in two jurisdictions; (b) those parties entered into a "with prejudice" stipulation of dismissal in only one of those two lawsuits; and (c) for some 20 months thereafter, the parties continued to litigate — without interposition of a res judicata defense by Carpenter — the other of the two lawsuits.[3] These circumstances, at the

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3. Carpenter argues that the First Southern District Action was *not* in fact actively litigated during most of the 20-month period following dismissal of the Massachusetts Action, and that he therefore was not required to assert his res judicata defense during that period. Appellee's Brief at 10 (arguing that "nothing was happening in the case as it was transferred" among Southern District judges). But the record shows that

(Cont'd)

very least, raise an issue of fact as to whether the stipulation was intended to have a limited effect. Whether or not that issue is material depends upon the governing law; for reasons stated below, we conclude that it is a material question at least under Massachusetts law.

B. *State Law*

In gauging the preclusive effect of the stipulation of dismissal, the district court (citing *Duncan I*) correctly decided that the question is controlled by principles of Massachusetts contract law. *See* Summary Judgment Order at *4 ("Massachusetts applies the principles of contract law to the interpretation of a stipulated dismissal.") (citing *Duncan I*, 1995 WL 96954, at *1).

Massachusetts law evidently allows and requires inquiry into the intended scope and effect of such a stipulation; in Massachusetts, "[t]he circumstances surrounding the making of [an] agreement must be examined to determine the objective intent of the parties." *Edmonds v. United States*, 642 F.2d 877, 881 (1st Cir. 1981) (citing *Louis Stoico, Inc. v. Colonial Dev. Corp.*, 369 Mass. 898, 902, 343 N.E.2d 872 (1976)). Unremarkably, "[i]n the first instance, it is for the court . . . to determine if a written document is or is not ambiguous." *Boston Edison Co. v. Federal Energy Regulatory Comm'n*, 856 F.2d 361, 365 (1st Cir. 1988). But "[i]n the search for plain meaning," the

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(Cont'd)
litigation *did* continue in the First Southern District Action after entry of the Massachusetts stipulation, including responsive pleadings (relating to a fourth-party complaint), further discovery, and a motion for summary judgment by Israel that the district court decided without Carpenter raising the issue of res judicata.

court should consider the clause at issue in light of "all the other phraseology contained in the instrument," and should also direct its interpretation "to the meaning of the terms of the writing or writings *in the light of the circumstances of the transaction.*" *Id.* (internal quotations and citations omitted) (emphasis added).

We think that "in the light of the circumstances of *th[is] transaction*" — the litigation of two nearly identical lawsuits simultaneously in two jurisdictions, the stipulated dismissal of one of them with prejudice, and the continued litigation of the other — a question arises as to the meaning of the stipulation of dismissal. We further conclude that, in construing the scope and effect of *this* Massachusetts stipulation under Massachusetts law, the district court needed to consider these unusual factual circumstances, cited by one party as evidence of both parties' clear intention. As the First Circuit explains:

> We recognize under Massachusetts law that, in order to utilize extrinsic evidence of the parties' intent, a court need not invariably find facial ambiguity. The Massachusetts courts have said:
>
> > When the written agreement, as applied to the subject matter, is in any respects uncertain or equivocal in meaning, all the circumstances of the parties leading to its execution may be shown for the purpose of elucidating, but not of contradicting or changing its terms.

ITT Corp. v. LTX Corp., 926 F.2d 1258, 1264 (1st Cir. 1991) (citations and emphasis omitted). We emphasize that this is *not* a case in which extrinsic or parol evidence is being proffered "for the purpose of . . . *contradicting or changing [the] terms*"

of the stipulation, *id.* (emphasis in original), because — wholly apart from any extrinsic or parol evidence — "all the circumstances of the parties leading to [the stipulation's] execution," *id.*, render its words ambiguous, or at least puzzling.

The district court reached that same conclusion in its Summary Judgment Order, but altered its view (upon Carpenter's motion for Rule 60(b) relief) after considering *Nemaizer* and *Duncan II*. On the whole, we believe that *Duncan II* supports our view that Massachusetts law permits consideration of transactional circumstances to shed light on contract language that might be held unambiguous as a purely textual matter.

Duncan involved a contract dispute over paint used to coat roadway bridges; the painting company sued the paint supplier for damages caused by "paint adhesion failures" on several projects (*i.e.*, peeling). *Duncan II*, 1996 WL 464048, at *1. The parties settled, and signed a stipulation dismissing the action with prejudice as to all claims "which were raised or which could have been raised herein." *Id.* Thereafter, the painting company experienced adhesion problems on the "Casey Overpass" project, and brought a second action against the paint supplier. *Id.* In *Duncan I*, the court declined to dismiss the claim under res judicata because "factual questions [remained] about the extent and reach of the settlement agreement," including "whether the Casey Overpass was included or could have been included in the [first] lawsuit, and whether the parties orally agreed to exclude the Casey Overpass from the settlement of that suit." *Duncan I*, 1995 WL 96954, at *1. After discovery, the paint supplier again moved for summary judgment on the ground of res judicata.

In *Duncan II*, the court granted summary judgment in favor

of the paint supplier. The court found that the painting company's pleadings in its first lawsuit "clearly show[ed] that the Casey Overpass was one of the several projects which had experienced paint adhesion failures"; that the painting company "considered the claims relating to the . . . Casey Overpass to be part of the same series of transactions on which the claims in the [first] action were based"; and that the painting company "knew of the paint adhesion problems at Casey Overpass . . . well prior to the settlement of the first action." *Duncan II*, 1996 WL 464048, at *2-*3. The court rejected the painting company's claim that "the parties orally agreed to exclude the Casey Overpass from the scope of the . . . stipulation of dismissal," because "[t]he stipulation of dismissal contains no such reservation"; the court therefore held that, "[b]y voluntarily dismissing the prior claims with prejudice without making any provision for an alleged collateral oral agreement to exclude claims relating to the Casey Overpass from the scope of the dismissal, [the painting company] has relinquished its right to raise those claims in this action." *Id.* at *3-*4.

We undertake this extended survey of *Duncan II* to make the following point: *Duncan II* does not support the view (adopted by the district court) that Massachusetts courts, as a matter of legal principle, are "reluctan[t] to find ambiguity in the language of a stipulation of dismissal." Rule 60(b) Order at *2. The court in *Duncan II* ultimately found no ambiguity in the stipulation of dismissal at issue there, given the circumstances of that particular case; but the court conducted precisely the analysis that one would expect under Massachusetts contract law: it interpreted the parties' stipulation of dismissal "as applied to the subject matter" of the agreement, and "in the light of the circumstances of the transaction." *Boston Edison*, 856 F.2d at 365 (internal quotations and citations omitted). In

so doing, the court in *Duncan II* considered the language of the stipulation — precluding all claims "which were raised or which could have been raised" — as well as the circumstances indicating that the parties appreciated its scope (for example, the plaintiff's prior awareness of its potential claim relating to the "Casey Overpass"). *Duncan II* does *not* undermine the general rule governing contract interpretation under Massachusetts law, that "[t]he circumstances surrounding the making of the agreement must be examined to determine the objective intent of the parties." *Edmonds*, 642 F.2d at 881 (citation omitted).

We agree with the district court's initial conclusion, denying summary judgment, that in this case the stipulation of dismissal "is ambiguous" and is susceptible of "two reasonable interpretations." Summary Judgment Order at *5. We therefore conclude that the district court erred in granting Rule 60(b) relief and summary judgment to Carpenter, and dismissing Israel's complaint on the ground of res judicata.

CONCLUSION

The judgment of the district court is vacated, and the case is remanded for further proceedings consistent with this opinion.[4]

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4. Carpenter made a motion to this Court for sanctions against Israel and his attorneys. We conclude that sanctions are unwarranted on this record, and therefore deny the motion.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED OCTOBER 3, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

95 Civ. 2703 (DAB) (JCF)

MEMORANDUM AND ORDER

DONALD M. ISRAEL and MARK R. TAYLOR,

Plaintiffs,

- against -

DANIEL E. CARPENTER, BENEFIT CONCEPTS NEW YORK, INC., and VOLUNTARY BENEFIT SYSTEMS, INC.,

Defendants.

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

In a Memorandum and Order dated May 15, 1996, I denied the defendants' motion for summary judgment based on grounds of res judicata (now more commonly referred to as claim preclusion). The defendants filed a notice of appeal,[1] and in a conference with staff counsel for the United States Court of

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1. That appeal was doomed to be dismissed since a denial of summary judgment is not generally an appealable order. *See Swint v. Chambers County Commission*, __ U.S. __, __, 115 S. Ct. 1203, 1207-08 (1995).

Appendix B

Appeals for the Second Circuit, it was agreed that the appeal would be withdrawn without prejudice to reinstatement to allow defendants' counsel to move in this Court for relief from my order pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. Accordingly, the defendants filed the instant motion, arguing that I should vacate my prior order on the grounds that one of the decisions I had relied on was subsequently overturned and that a Second circuit decision not previously brought to my attention compels a decision in their favor.

Background

The history of this case is set forth in my May 15, 1996 Memorandum and Order and will be recounted only briefly here. The plaintiffs in this action, Donald M. Israel and Mark R. Taylor, brought suit in Massachusetts state court in February 1993 against Daniel E. Carpenter and three corporate defendants. They raised the same claims against Mr. Carpenter that they assert in the instant action. The parties then agreed to dismiss the Massachusetts action, and a stipulation of dismissal was drafted by Stephen A. Roach, counsel for the plaintiffs. That stipulation provided that the action be dismissed with prejudice as to Mr. Carpenter and without prejudice as to the remaining defendants. The stipulation was filed and the state court action was terminated.

In my May 15, 1996 Memorandum and Order, I found that the stipulation was subject to more than one interpretation because it failed to specify whether the dismissal of claims against Mr. Carpenter with prejudice applied to litigation only in the Massachusetts state court or in any forum, including federal district court. Moreover, I found that there was extrinsic evidence that would support either construction. Therefore, I denied summary judgment.

Appendix B

In the instant motion, the defendants contend that *Duncan Galvanizing Corp. v. Valspar Corp.*, No. 93-12368-Z, 1995 WL 96954 (D. Mass. Feb. 21, 1995) ("*Duncan I*"), on which I relied, was overturned after I issued my decision. They further argue that summary judgment on res judicata grounds is mandated by *Nemaizer v. Baker,* 793 F.2d 58 (2d Cir. 1986), a decision that neither party cited in the previous round of briefing.

Discussion

Rule 60(b) of the Federal Rules of Civil Procedure authorizes a court to provide relief from a prior order or judgment on the basis, among others, of newly discovered evidence (Rule 60(b)(2))), the reversal of authority on which it was based (Rule 60(b)(5)), or "any other reason justifying relief from operation of the judgment" (Rule 60(b)(6)). "A motion under Rule 60(b) is addressed to the sound discretion of the trial court . . . ." *In re Emergency Beacon Corp.*, 666 F.2d 754, 760 (2d Cir. 1981): *see also Whimsicality, Inc. v. Rubie's Costume Co.*, 836 F. Supp. 112, 116 (E.D.N.Y. 1993). Thus, "[a] court is justified in exercising this discretion if: (1) there is an intervening change in the controlling law; (2) new evidence not previously available comes to light; or (3) it becomes necessary to remedy a clear error of law or to prevent obvious injustice." *Segarra v. Messina,* 158 F.R.D. 230, 232 (E.D.N.Y. 1994).

In this case, the authority now proffered by the defendants warrants reconsideration of my prior order. In that opinion, I cited *Duncan I* for the general principle that Massachusetts applies rules of contract law to the interpretation of stipulations of dismissal. In *Duncan Galvanizing Corp. v. Valspar Corp.*, No. 93-12368-GAO, 1996 WL 464048 (D. Mass. July 12, 1996) ("*Duncan II*"), the court did not undermine that proposition.

Nevertheless, the court's treatment of the stipulation of dismissal in that case is instructive. There, the parties had stipulated to dismissal of a prior action concerning the plaintiff's claim that the defendant had supplied it with defective paint. *Id.* at * 1. However, the plaintiff presented evidence that the parties had orally agreed to exclude from the settlement the project that was the subject of the second action. *Id.* at * 3. Nevertheless, the court held that "[b]y voluntarily dismissing the prior claims with prejudice without making any provision for an alleged collateral oral agreement . . . [plaintiff] has relinquished its right to raise those claims in this action." *Id.* at * 4.

The circumstances in *Nemaizer* were similar. There, the plaintiff had brought an action in state court under state labor law. *Nemaizer,* 793 F.2d at 60. After the defendants removed the action to federal court, the plaintiff voluntarily discontinued the action. *Id.* Thereafter, the plaintiff brought another action in federal court asserting ERISA claims based on the same set of facts. *Id.* In order to permit the second case to proceed, the court vacated the order that had dismissed the first case "with prejudice" on the ground that plaintiff's counsel had not intended to foreclose the subsequent ERISA action. *Id.* On appeal, Judge Meskill noted in dissent that the trial court "found that the term 'this action' in the parties stipulation was ambiguous" and "proceeded to determine the intended meaning of the term." *Id.* at 68 (Meskill, J., dissenting). The majority, however, rejected this approach. It held that "the agreement clearly precluded [the plaintiff] from bringing the instant ERISA claim. Had [the plaintiff] intended to preserve that right, he should not have entered into this type of 'with prejudice' stipulation." *Id.* at 62.

Thus, both the district court in *Duncan II* and the Second Circuit in *Nemaizer* exhibited a decided reluctance to find

ambiguity in the language of a stipulation of dismissal. Applying a similar analysis here, I am constrained to hold that the plaintiffs are barred from raising in this action the claims that were dismissed by stipulation in Massachusetts. There, they agreed to a dismissal "with prejudice" as to Mr. Carpenter. Yet their counsel failed to specify that the claims nevertheless could be revived in a different forum, as was purportedly the plaintiffs' intent. As in both *Duncan II* and *Nemaizer,* the plaintiffs must bear the consequences of this omission.

To adhere to my prior determination in the face of the authority now presented would be error. It would be unjust to require the parties to proceed to trial merely because my earlier decision was made without the benefit of controlling caselaw. Therefore, the defendants are entitled to have my prior order vacated and to have summary judgment granted in their favor.

Conclusion

For the reasons set forth above, the defendants' Rule 60(b) motion is granted, my Memorandum and Order dated May 15, 1996 is vacated, and summary judgment is granted to defendants. The Clerk of the Court shall enter judgment dismissing the complaint.

SO ORDERED.
s/ James C. Francis IV
JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York
October 3, 1996

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 15, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

95 Civ. 2703 (DAB)

MEMORANDUM AND ORDER

DONALD M. ISRAEL and MARK R. TAYLOR,

Plaintiffs,

- against -

DANIEL E. CARPENTER, BENEFIT CONCEPTS NEW YORK, INC., and VOLUNTARY BENEFIT SYSTEMS, INC.,

Defendants.

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

The plaintiffs commenced this action against the defendants in the Supreme Court of the State of New York asserting breach of contract claims. The defendants subsequently removed the case to the United States District Court for the Southern District of New York on grounds of diversity jurisdiction. Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the defendants have moved for summary judgment dismissing the entire complaint on grounds of res judicata, for summary judgment on the fifth cause of action for lack of standing, and for summary judgment dismissing Voluntary Benefit Systems, Inc. ("VBS")

as a defendant. The plaintiffs have cross-moved for partial summary judgment striking the defendants' affirmative defense of res judicata on grounds that they waived this argument by not asserting it earlier. The parties consented to my jurisdiction for all purposes pursuant to 28 U.S.C. § 636(c). For the reasons that follow, the defendants' motion for summary judgment on grounds of res judicata and the plaintiffs' cross-motion for partial summary judgment are denied; the defendants' motion to dismiss the fifth cause of action for lack of standing and their motion to dismiss VBS are granted.

Background

The underlying facts of this case were set forth in detail in *Israel v. Carpenter,* No. 95 Civ. 2703 (DAB), 1995 WL 640534 (S.D.N.Y. Oct. 31, 1995), and in *Israel v. Carpenter,* No. 95 Civ. 2703 (DAB), 1996 WL 11252 (S.D.N.Y. Jan. 11, 1996). I will only briefly review them here.

In February 1993, Donald M. Israel and Mark R. Taylor brought suit against Daniel E. Carpenter and three other corporate defendants in state court in Massachusetts. In July 1993, the Massachusetts action was terminated pursuant to a stipulation dismissing the claims against Mr. Carpenter with prejudice and the claims against the remaining defendants without prejudice. *Israel v. Carpenter*, No. 93-0870 (Sup. Ct. Mass. Aug 10, 1993).

In a related case filed in March 1993 in this Court, Benefits Concepts New York ("BCNY") brought suit against Mr. Israel, Mr. Taylor, and two other corporate defendants. In the same action, Mr. Israel and Mr. Taylor filed a third-party complaint against Mr. Carpenter. I granted summary judgment dismissing

Appendix C

BCNY's federal trademark claims and dismissing the remaining state claims for want of diversity. *Benefit Concepts New York v. Benefit Concepts. Inc.*, 93 Civ. 1961 (DLC), 1995 WL 133773 (S.D.N.Y. March 28, 1995).

The plaintiffs then filed the present action the following day, March 29, in New York State Supreme Court. The complaint in the New York case stated essentially the same causes of action that had been asserted in the Massachusetts action. Asserting that the parties were now diverse, the defendants then removed the case to this Court and moved to dismiss on grounds of res judicata and collateral estoppel. In response, the plaintiffs cross-moved to remand the suit to the state court for want of diversity jurisdiction. I then ordered the defendants to present evidence as to their principal place of business, and I did not reach the remaining motions. *Israel*, 1995 WL 640534, at *4.

After examining the defendants' uncontested evidence with regard to their place of business, I determined that there was complete diversity among the parties and accordingly denied the plaintiffs' motion to remand this action to state court. I also denied the defendants' motion to dismiss on grounds of res judicata, standing, and laches without prejudice to renewal as a motion for summary judgment. *Israel*, 1996 WL 11252, at *3.

Discussion

As a threshhold matter, I address the plaintiffs' argument that the defendants waived any res judicata defense based upon the Massachusetts Stipulation of Dismissal. I then consider what effect the stipulated dismissal has on the instant case. Finally, I address the defendants' motions for summary judgment to dismiss the fifth cause of action and to dismiss VBS as a defendant.

Appendix C

A. *Standard for Summary Judgment*

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment should be granted only "when, viewing the record in the light most favorable to the non-moving party, the evidence offered demonstrates that there is no genuine issue of fact and that the moving party is entitled to judgment as a matter of law." *Cinema North Corp. v. Plaza at Latham Associates*, 867 F.2d 135, 138 (2d Cir. 1989) (citations omitted). However, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). Furthermore,

> the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Thus, disagreements about non-material facts or controversy over the legal significance of undisputed facts will not impede summary judgment. The role of the trial court on a motion for summary judgment is "to determine as a threshold matter whether there

are genuine unresolved issues of material fact to be tried." *Gibson v. American Broadcasting Cos.*, 892 F.2d 1128, 1132 (2d Cir. 1989). Because summary judgment "deprives a party of its day in court and the right to present its case to a jury, the district court in examining the record must resolve all ambiguities and draw all reasonable inferences in favor of the nonmoving party." *Id.* Therefore, "[i]n evaluating the sufficiency of the nonmoving party's evidence, . . . courts must still proceed very cautiously." *Brady v. Town of Colchester*, 863 F.2d 205, 211 (2d Cir. 1988).

B. *Waiver*

Rule 8(c) of the Federal Rules of Civil Procedure states in pertinent part: "In pleading to a preceding pleading, a party shall set forth affirmatively . . . res judicata . . . and any other matter constituting an avoidance or affirmative defense." The purpose of Rule 8(c) is to give the opposing party notice of the affirmative defense and the chance to rebut it. *Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation*, 402 U.S. 313, 350 (1971); *see also United States v. Continental Illinois Nat'l Bank and Trust Co. of Chicago*, 889 F.2d 1248, 1255 (2d Cir. 1989) (primary purpose of Rule 8(c) to avoid surprise to plaintiff). Thus, a res judicata defense is waived only if the party asserting it is so tardy in raising it that the party opposing it is prejudiced in its ability to respond. *Kleinknecht v. Gettysburg College*, 989 F.2d 1360, 1373-74 (3d Cir. 1993) (affirmative defense of immunity allowed where first raised on a motion for summary judgment); *see also Snyder v. United States*, No. 88-CV-2136 (RR), 1995 WL 724529, at *11 (E.D.N.Y. July 26, 1995) (no prejudice where defendant raised affirmative defense of fraudulent conveyance during conference, amended answer, and later on motion for summary judgment); *United States v. Krieger*,

773 F. Supp. 580, 583 (S.D.N.Y. 1991) (failure to plead affirmative defense of illegality did not preclude defendants from raising that defense on motion of summary judgment where plaintiff had adequate time to respond); *Carino v. Town of Deerfield*, 750 F. Supp. 1156, 1162 n.9 (N.D.N.Y. 1990) ("[I]n this Circuit defendants are not deemed to have waived the affirmative defense of *res judicata* by failing to expressly assert it in their answer"), *aff'd*, 940 F.2d 649 (2d Cir. 1991); *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706, 715 (S.D.N.Y. 1987) ("Although Fed.R.Civ.P. 8(c) requires affirmative defenses to be pleaded, courts have been more lenient in the context of motions for summary judgment.").

In this case, the affirmative defense of res judicata was originally raised on a motion to dismiss and renewed on a motion for summary judgment, before any answer was filed. Nevertheless, the plaintiffs argue that the defendants waived the defense by failing to raise it in their answer in the previous federal action, and the plaintiffs assert in conclusory terms that they are therefore prejudiced. However, it is irrelevant whether or not the defendants raised any affirmative defenses in the previous federal action because that action was dismissed for lack of subject matter jurisdiction. In any event, the plaintiffs had adequate notice of the res judicata issue. Because the defendants raised the defense of res judicata prior to the filing of an answer in this case, the plaintiffs have not been unfairly prejudiced and have been given adequate time to respond. Therefore, the plaintiffs' cross-motion for summary judgment striking the affirmative defense of res judicata is denied.

C. *Res Judicata*

In determining whether a state court judgment has

preclusive effect in federal court, the federal court must look to the law of the state from which the judgment emerged. *See Allen v. McCurry*, 449 U.S. 90, 96 (1980); *Doctor's Associates Inc. v. Distajo*, 66 F.3d 438, 446-47 (2d Cir. 1995); *Valley Disposal, Inc. v. Central Vermont Solid Waste Management Dist.*, 31 F.3d 89, 98 (2d Cir. 1994). This result is required by the full faith and credit statute, which states:

> [J]udicial proceedings [of any court of any state] shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such States[.]

28 U.S.C. § 1738. Accordingly, the question of preclusion here is governed by the laws of Massachusetts.

Massachusetts applies the principles of contract law to the interpretation of a stipulated dismissal. *See Duncan Galvanizing Corp. v. Valspar Corp.*, No. 93-12368-Z, 1995 WL 96954, at *1 (D. Mass. Feb. 21, 1995) (citations omitted). Under that state's contract law,

> [T]he construction of an unambiguous contract is a question of law reserved for the court. *Boston Edison v. Federal Energy Regulatory Comm'n*, 856 F.2d 361, 365 (1st Cir. 1988); *Freelander v. G. & K. Realty Corp.*, 357 Mass. 512, 516, 258 N.E.2d 786 (1970). Likewise, the determination of whether a contract is in fact ambiguous is a question of law. *Boston Edison*, 856 F.2d [361], 365 (1st Cir. 1988)). A contract is considered [ambiguous] where the terms used can reasonably support differing interpretations. *Fashion House. Inc. v. K Mart Corp.*, 892 F.2d 1076, 1083 (1st

> Cir. 1989). A contract that lacks ambiguity must be enforced according to its terms. *Liberty Mut. Ins. Co. v. Gibbs*, 773 F.2d 15, 17 (1st Cir. 1985). In construing a contract, a court must give reasonable effect to each provision, and the contract must be viewed as a coherent whole. *J.A. Sullivan Corp. v. Commonwealth*, 397 Mass. 789, 795, 494 N.E.2d 374 (1986).
>
> . . .
>
> [W]here the contract is ambiguous and extrinsic evidence is used, a factual question may create a proper case for a jury regarding the meaning of a contract. *Atwood v. Boston*, 310 Mass. 70, 75, 37 N.E.2d 131 (1941). Such is the case 'where more than one view can be taken of the evidence respecting the circumstances of the parties and the condition of the subject with which they are dealing.' *Ober v. National Casualty Co.*, 318 Mass. 27, 30, 60 N.E.2d 90 (1945). Thus, a contract cannot be interpreted as a matter of law by the court where there exists a dispute regarding material facts or the inferences to be drawn from the facts. *Computer Sys. Eng'r. Inc. v. Oantel Corp.*, 740 F.2d 59, 65 n.8 (1st Cir. 1984); *Hamed v. Fadili*, 408 Mass. 100, 106, 556 N.E.2d 1020 (1990); *Thomas v. Christensen*, 12 Mass. App. Ct. 169, 174, 422 N.E.2d 472 (1981).

Boston Helicopter Charter. Inc. v. Agusta Aviation Corp., 767 F. Supp. 363, 369-70 (D. Mass. 1991).

Under this framework, I must first determine whether the stipulation is ambiguous. *Boston Edison*, 856 F.2d 361, 365 (1st Cir. 1988) (citing *RCI Northeast Servs. Div. v. Boston Edison*

Co., 822 F.2d 199, 202 (1st Cir. 1987) (construing Massachusetts law)). "A contract is not ambiguous simply because the parties disagree about its meaning." *Boston Helicopter Charter*, 767 F. Supp. at 370. Furthermore, Massachusetts courts generally do not look behind a clear written instrument. *Id.*

In this action, however, the stipulation is ambiguous because the phrase "dismissed with prejudice" has two reasonable interpretations: either the parties intended to terminate the case against Mr. Carpenter with prejudice only to its revival in the Massachusetts courts, or they intended the dismissal to bar future action in all jurisdictions. *Cf. Brown v. Bullock*, 17 A.D.2d 424, 428-29, 235 N.Y.S.2d 837, 841 (1st Dep't 1962) (dismissal with prejudice in one court does not necessarily bar action in different forum).

Once the Court determines that the stipulation is ambiguous it can examine the extrinsic evidence to ascertain whether there are genuine unresolved issues of material fact. Both parties submitted statements from their counsel in the Massachusetts action. Jack E. Robinson, the defendants' attorney, stated that he did not intend to limit the scope of the dismissal to Massachusetts only. Deposition of Jack E. Robinson dated Feb. 23, 1996, attached as Exh. I to Defendants' Motion for Summary Judgment. Stephen A. Roach, the plaintiffs' Massachusetts counsel, stated that the intent of both parties was to terminate the Massachusetts case against Mr. Carpenter with prejudice only to future suit in Massachusetts, with the expectation that the parties would continue the pending suit in federal court. Declaration of Stephen A. Roach, Esq. dated March 13, 1996; Affidavit of Stephen A. Roach dated October 17, 1995.

In addition, the defendants contend that the following facts show that the parties had intended to dismiss the Massachusetts

action with prejudice to future litigation in any jurisdiction: (1) in drafting the stipulation as well as letters to counsel and the clerk of the court, Mr. Roach placed no limitations on the dismissal; (2) Rule 41(a)(1) of the Massachusetts Rule of Civil Procedure provides that "[u]nless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice. . ."; (3) after the Massachusetts action was dismissed in July 1993, the plaintiffs waited twenty months before filing this action; (4) the defendants had moved for sanctions against Mr. Roach in the Massachusetts action; (5) Mr. Carpenter's motion to dismiss the Massachusetts action was inadvertently granted after the parties signed the stipulation; and (6) BCNY and VBS were not parties in Massachusetts action.

In response, the plaintiffs point to a letter that Mr. Carpenter faxed to a party in the Massachusetts suit on August 16, 1993. In that letter, Mr. Carpenter wrote,

> [S]o for Taylor, who is no longer with TNE [The New England], and Israel to win they must bring a lawsuit against me and TNE in a new state because they have already lost in Massachusetts and New York Federal Court because it is past time for bringing Third Party actions in New York Court. They are now precluded from bringing an action in Massachusetts and could not sue in Federal Court anywhere for lack of diversity.

Letter of Daniel E. Carpenter to Kenneth Murrell attached as Exh. B to Reply Certification of Mitchell V. Shornick, Esq. dated April 12, 1996. Additionally, the defendants' failure to raise the res judicata defense for twenty months after the date of the stipulation, while not a waiver, cuts against their assertion that they have always believed the Massachusetts stipulation to preclude an action in another court.

Appendix C

Because the parties have presented facts from which different inferences as to their intent may be drawn, the stipulation cannot be interpreted as a matter of law.[1] *See RCI Northeast Servs. Div.*, 822 F.2d at 202 ("[W]here the plain meaning of a contract phrase does not spring unambiguously from the page or from the context, its proper direction becomes one for the factfinder, who must ferret out the intent of the parties.") (citations omitted). Accordingly, the defendants' motion for summary judgment on grounds of res judicata is denied.

D. *Standing*

The next issue is whether the plaintiffs have a standing to bring the lawsuit for breach of an employment agreement.[2] Under New York law,[3] to state a claim for breach of contract

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1. The defendants also argue that it is too late for the plaintiffs to seek to modify the Massachusetts dismissal since any such motion should have been made within one year of entry of the order pursuant to Rule 60(b) of the Massachusetts Rules of Civil Procedure. This contention misinterprets the nature of this motion. The plaintiffs do not seek to vacate or modify the Massachusetts stipulation; rather, they seek to have the Court construe it according to what they contend was the intention of the parties.

2. A copy of the employment and shareholders agreements can be found as exhibits 5 and 6, respectively, in the Defendants' Memorandum in Support of Dismissal and Sanctions dated April 19, 1995.

3. A federal court sitting in a diversity case applies the choice of law rules of the state in which the case was brought. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941). In this case, New York choice of law rules apply because the plaintiffs brought the claims that are subject

(Cont'd)

"the plaintiffs must plead the existence of a contract between the parties, breach and damages." *Pompano-Windy City Partners Ltd. v. Bear Stearns & Co.*, 794 F. Supp. 1265, 1290 (S.D.N.Y. 1992) (citation omitted).

1. *Employment Agreement*

With respect to the employment agreement, the defendants argue that the plaintiffs failed to demonstrate the existence of a contract between the parties. A breach of contract action is predicated on privily or its equivalent. *Dweck v. Pacificorp Capital. Inc.*, 91 Civ. 2095 (MJL), 1995 WL 552745 at *3 (S.D.N.Y. Sept. 15, 1995) (citations omitted). In response, the plaintiffs have not contended that they are parties to the employment agreement, and they have failed to raise issues of fact from which a relationship of privity may be inferred. Accordingly, summary judgment is appropriate, as the plaintiffs lack standing to assert this claim.

2. *Shareholders Agreement*

The plaintiffs also allege that the defendants breached the shareholders agreement by diverting corporate opportunities from BCNY to VBS. However, the shareholders agreement was

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(Cont'd)
of the instant motion in the Supreme Court in the State of New York. Under New York law, "the contractual selection of governing law is generally determinative so long as the chosen state has sufficient contacts with the transaction, absent fraud or violation of public policy." *PC Com. Inc. v. Protean. Inc.*, 906 F. Supp. 894, 900 (S.D.N.Y. 1995) (citation omitted). Here, the section 23 of the employment agreement and section 15 of the shareholders agreement provide that New York law is applicable, and on that basis New York substantive law controls.

itself terminated by a buy-out agreement.[4] By the terms of that buy-out agreement, any action the plaintiffs may have had against the defendants under the shareholders agreement was extinguished.[5] Consequently, the plaintiffs' claim that the defendants breached the shareholders agreement cannot survive summary judgment. *See Mellon Bank. N.A. v. United Bank Corp. of New York*, 31 F.3d 113, 115 (2d Cir. 1994) (citing *Williams & Sons Erectors Inc. v. South Carolina Steel Corp.*, 983 F.2d 1176, 1183 (2d Cir. 1993) ("Summary judgment may be granted when the provisions of a contract convey a definite and precise meaning, absent any ambiguity.")).

E. *Voluntary Business Systems, Inc.*

As the defendants note, the plaintiffs have not pled any cause of action against VBS nor have the plaintiffs submitted any evidence in support of its case against VBS. In light of the

4. A copy of the buy-out agreement can be found as Exhibit 4 in the Defendants' Memorandum of Law in Support of Dismissal and Sanctions dated April 19, 1995.

5. Paragraph 8 of the buy-out agreement explicitly states "[t]hat certain Shareholders Agreement dated April 11, 1990 between BCNY, DEC [Mr. Carpenter], MRT [Mr. Taylor] and DMI [Mr. Israel] is hereby terminated." Additionally, paragraph 27 of the buy-out agreement states:

> Except as specifically provided in this Agreement, MRT, DMI . . . hereby release BCNY, DEC . . . and the other parties to this Agreement for any reimbursement for travel and entertainment or any other reimbursements, salary, draw, profits, bonuses, insurance, benefits or any other compensation or thing of value which MRT or DMI ever had, now have or may have against any of the other parties to this Agreement rising out of or relating to MRT's or DMI's respective positions as shareholders, directors, officers, employees or agents of BCNY . . . prior to and including the date of this agreement.

plaintiffs' complete failure to make a showing sufficient to establish the essential elements of its claims against VBS, the defendants' motion for summary judgment dismissing VBS is granted. *See Massachusetts Casualty Ins. Co.*, 886 F. Supp. at 1004.

Conclusion

For the foregoing reason, the defendants' motion for summary judgment on grounds of res judicata and the plaintiffs' cross-motion for partial summary judgment to strike the affirmative defense of res judicata are denied. The defendants' motion for summary judgment on the fifth cause of action and their motion for summary judgment dismissing VBS as a defendant are granted.

SO ORDERED.
s/ James C. Francis IV
JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York
May 15, 1996

Copies mailed this date to:

Mitchel Shornick, Esq.
Fisher, Weisinger, Caliguire
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APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED SEPTEMBER 19, 1997

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 19th day of September one thousand nine hundred and ninety-seven.

Dkt No: 96-9480

ISRAEL,

Plaintiffs-Appellants,

v

CARPENTER,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellees Daniel E. Carpenter, Benefit Concepts New York, Inc., Voluntary Benefit Systems, Inc.

Appendix D

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

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